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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EMMIE LOVELACE, Defendant and Appellant.	B159495 (Los Angeles County Super. Ct. No. BA175067)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia A. Bigelow, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth N. Sokoler and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Emmie Lovelace appeals from the judgment entered upon her conviction by jury of voluntary manslaughter, a lesser included offense of the charged offense of murder, with the finding that a principal was armed with a firearm. (Pen. Code, §§ 192, subd. (a), 12022, subd. (a)(1).) She was sentenced to 12 years in prison.

Appellant contends that (1) the trial court erred in failing to instruct the jury to view oral admissions with caution pursuant to CALJIC No. 2.71.7; (2) the trial court erred in failing to instruct the jury on the differences between murder and involuntary manslaughter pursuant to CALJIC No. 8.51; (3) the trial court erred in admitting gruesome and prejudicial autopsy photographs; (4) the trial court abused its discretion under Evidence Code section 352 in admitting hearsay statements regarding the prior criminal history of alleged shooter Avance Smith; (5) the trial court erred in instructing the jury on voluntary manslaughter; and (6) her conviction of voluntary manslaughter must be modified to involuntary manslaughter because the record contains no evidence of sudden quarrel or heat of passion.

We affirm.

FACTS

We view the evidence in accordance with the usual rules on appeal. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Flavio Sanchez (Sanchez), appellant's former live-in boyfriend, was killed by several gunshot wounds to the head, jaw, and throat as he was driving home from work at approximately 11:00 or 11:30 p.m. on Saturday, September 19, 1998. The shots were fired at the intersection of 64th Street and Broadway in Los Angeles from the passenger side of a car identified as that registered to the wife of Avance Smith (Avance), which followed Sanchez with its headlights turned off as Sanchez left work. Officers arriving at the scene of the shooting found 5 nine-millimeter casings and observed two bullet holes in the upper part of the driver's side front door and one bullet hole in the upper part of the driver's side rear door. The driver's side front window had been completely shot out and the driver's side rear window had been partially shot out. The bullet casings found at the scene and the bullets

recovered from Sanchez's body were determined to have been fired from a gun subsequently found in the residence of Lester Johnson (Johnson).[1]

Shortly after the shooting, Avance and Johnson arrived at a card party attended by appellant, Avance's wife, and Rochelle Smith (Rochelle), who was a friend of Avance's wife and was best friends with appellant. Johnson was jumpy and fidgety and appeared to be drunk. Avance and appellant, who had never had a private conversation before, spoke alone for several minutes, then Avance went out to his car and came back displaying a gun. Avance, his wife, and Johnson then left.

The next morning, Sunday, September 20, 1998, Rochelle looked in on appellant, who had been living with her for a few weeks. Appellant appeared to have been crying and drinking. She asked Rochelle to take her to the bank, stating that she wanted to get some beer and "wanted to take care of the people, who[] did what they were supposed to do, if they did it." Appellant also stated that she wanted confirmation because she "didn't want to pay if it didn't happen." Appellant withdrew $220 and then another $80 from an automated teller machine (ATM).

That afternoon, Avance came to Rochelle's house and told appellant and Rochelle, "Take this to your grave." He told the women that Sanchez had not driven home the way appellant had described and stated that he had shot along the car "from the door to the front." Appellant screamed and said, "I didn't want him dead. I just wanted him beat up." She or Avance then called Sanchez's place of employment and asked for him. Appellant then screamed, "No." Appellant did not go to work at all the following week, and each night Rochelle saw her drinking.

Also on September 20, 1998, the day after the shooting, Rochelle Patino (Patino), another good friend of appellant's who lived across the street from the house appellant had shared with Sanchez, learned that Sanchez had been killed. She told Sanchez's family members that the previous day, appellant had told her Sanchez was going to die.

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[1] The trials of Avance and Johnson were severed from that of appellant, and neither is party to this appeal.

Sanchez's coworker testified that he was with Sanchez's family when a neighbor, presumably Patino, came over and stated that on the day of the shooting, appellant had told her that Sanchez was not going to see the next day.

Five or six days later, Patino told appellant, "I know you did it. [¶] You know, it's too obvious. You called me the night before. The next morning I wake up and he's dead." Appellant looked happy and said, "Do you see me hurting?" Appellant told Patino that Sanchez had "messed with the wrong person" and that she had paid people $500 to kill him. She told Patino that these individuals had pulled up alongside Sanchez and shot him nine times with a nine-millimeter weapon. Although appellant told Patino not to tell anyone what she had said, Patino called the police.

Appellant was arrested on September 25, 1998. Avance was arrested a few days later. His electronic organizer was recovered from his car and, on the calendar for September 1998, the "19" was blinking. A telephone number was listed under the name "Les-Dog," which corresponded to the phone number of Johnson, who was known as Les-Dog. Johnson was arrested and the semiautomatic firearm that fired the fatal bullets was recovered from his residence. Avance called Rochelle, told her to tell the truth, and stated, "You didn't see any money exchanged." Rochelle did not initially tell the police all she knew, out of fear of Avance, but the next day she told them the truth.

Further evidence disclosed that appellant and Sanchez had purchased a house in Norwalk in both their names in June 1996, and each month appellant gave her half of the mortgage to Sanchez so he could make the payment. She had always wanted to own her own home. In November 1996, however, unbeknownst to appellant, Sanchez began to miss mortgage payments, and although he made some late payments in the next few months, in August 1997 foreclosure proceedings were instituted. Appellant received a foreclosure letter in the mail, which upset her because she suspected that Sanchez had used her part of the mortgage payment to buy himself a new car. A foreclosure sale was held in July 1998, resulting in appellant's and Sanchez's loss of all the equity they had had in the house. Appellant told Patino that she was angry about the foreclosure and she told Rochelle she was angry because she had always wanted to have a house.

Appellant's and Sanchez's relationship began to deteriorate in the months before September 1998, even before the foreclosure. Appellant told Rochelle that appellant was physically and mentally abusive. On one occasion about a month before appellant moved out of the house, Sanchez beat down appellant's bedroom door with a hammer and grabbed her by the neck. Appellant then went to Patino's house and asked if she had a gun or if she knew where to get one. Patino said no, and appellant asked if she knew anyone who could "take care of it" for her. Patino said no, and appellant stated that if she had a gun she would "do it herself." On several other occasions in the month before appellant moved out, she told both Patino and Rochelle that she wanted someone to "jump" Sanchez, meaning to "beat him up," and that she wanted him dead. She also told them that she believed Sanchez had been unfaithful to her. She told Rochelle that she felt Sanchez had taken something from her, meaning the house.

On the day appellant moved out of the house, in July or August 1998, she held some matches and told Rochelle, "I ought to torch this place," but Rochelle stopped her. Appellant poured gasoline on Sanchez's bed and told Patino that she wanted to burn Sanchez's possessions because she had paid for them, and asked Patino if she knew anyone who would "take care of him." She also spoke to the two men who helped her move about "jumping" Sanchez, and she drove them past Sanchez's place of employment. Later that night, Patino went with appellant to an ATM, where appellant withdrew some cash, but Sanchez was not "jumped."

A week or two before the shooting, appellant told Rochelle that she wanted to have Sanchez beaten up and wanted "to make him . . . hurt like [she was] hurting." She asked Rochelle whether Rochelle knew anyone who would beat Sanchez up. Rochelle told her that Avance might know someone who would, because she thought "he was an ex-gang member" and that "he had committed murder once or was accused of murder."

During the weeks between the time appellant moved out of the Norwalk house and the time of the shooting, appellant lived with Rochelle, and Avance and his wife frequently came over to socialize with them. Avance came over unexpectedly on the morning of September 19, 1998, and asked for appellant. He and appellant went out

together, which Rochelle had never seen them do before. Appellant returned later that afternoon after withdrawing $300 from an ATM. That day, appellant called Patino and told her to tell Patino's boyfriend to leave his apartment in the garage of the Norwalk house, where Sanchez was still living, because Sanchez was going to die that night. Appellant started to invite Patino to go someplace with her, but then said she would call her back because she had to "take care of something else." During this conversation, appellant sounded "[e]xcited" and "[h]appy." At some point appellant told Patino that she was "going to get back three times the amount that he took from her."[2]

Appellant presented no testimony.

DISCUSSION

I. Appellant is not entitled to reversal because of any error in the delivery of voluntary manslaughter instructions.

The trial court instructed the jury on murder, including several theories of first degree murder and second degree murder, as well as on voluntary manslaughter based on sudden quarrel or heat of passion and on involuntary manslaughter. The trial court also instructed the jury on principles of aiding and abetting, including the theory of natural and probable consequences. The jury found appellant guilty of voluntary manslaughter. Appellant contends that since there was no evidence of sudden quarrel or heat of passion, the trial court erred in instructing the jury on voluntary manslaughter, requiring reversal of her conviction. This claim must fail.

Voluntary manslaughter is a lesser included offense of murder. (*People v. Lee* (1999) 20 Cal.4th 47, 58-59 (*Lee*).) In *People v. Breverman* (1998) 19 Cal.4th 142, the Supreme Court set forth the standard under which a trial court is obligated to give an instruction on a lesser included offense. "[T]he existence of '*any* evidence, no matter

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[2] In October 1996, a life insurance policy on Sanchez was issued with appellant the beneficiary. The policy would pay appellant $104,600, the amount of their mortgage, if Sanchez died. At the time of trial, appellant had not filed a claim on the policy, although Sanchez's sister had filed a claim.

how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id*. at p. 162.)

As in *Lee*, *supra*, 20 Cal.4th at page 60, we need not decide whether the evidence here was sufficient to support the giving of an instruction on voluntary manslaughter on the theory of sudden quarrel or heat of passion. Appellant may not complain of any such error because it inured to her benefit.

In *Lee*, the defendant was charged with murder and was convicted of voluntary manslaughter. The Supreme Court held that any error in instructing the jury on voluntary manslaughter on a heat of passion theory because of a lack of evidentiary support for such instruction was favorable to the defendant and thus was not cause for reversal. This was so because when the jury found him guilty of voluntary manslaughter, it "necessarily found that the killing was intentional which, ordinarily, would establish malice and thus murder." (*Lee*, *supra*, 20 Cal.4th at p. 63.) The court concluded, "When, as here, a jury necessarily finds all of the facts required for a conviction of murder, but convicts the defendant of voluntary manslaughter, any error in that conviction is favorable to the defendant. . . . He may not 'invoke reversal on an error which is favorable to him.' [Citation.]" (*Id*. at pp. 64-65.)

Appellant argues that *Lee* is inapplicable to her case because after *Lee* was decided, the Supreme Court concluded that intent to kill is not a necessary element of voluntary manslaughter. (*People v. Lasko* (2000) 23 Cal.4th 101, 107-111 (*Lasko*).) Thus, appellant argues, it cannot be said that her jury necessarily found an intent to kill in convicting her of voluntary manslaughter.

However, voluntary manslaughter is also committed "when one kills unlawfully, and with *conscious disregard for life*, but lacks malice because of provocation or imperfect self-defense. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 461, fn. 7.)

As respondent points out, appellant's jury was instructed that voluntary manslaughter, as well as second degree murder, requires *either* intent to kill *or* a conscious disregard for life.[3] Thus, in finding appellant guilty of voluntary manslaughter, the jury necessarily found that the killing either was intentional or was committed with conscious disregard for life, which ordinarily would establish malice and thus that the defendant is guilty of murder. (*Lasko*, *supra*, 23 Cal.4th at p. 107; see *Lee*, *supra*, 20 Cal.4th at p. 63.) Had appellant's jury not found an absence of malice as a result of sudden quarrel or heat of passion, pursuant to an instruction which appellant claims was erroneously given, it would have convicted her of second degree murder.

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[3] The jury was instructed pursuant to CALJIC No. 8.40 on voluntary manslaughter as follows: "Every person who unlawfully kills another human being without malice aforethought but *either with an intent to kill, or acting with a conscious disregard for human life,* is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion. [¶] 'Conscious disregard for life,' as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The perpetrator of the killing *either intended to kill the alleged victim, or acted in conscious disregard for life;* and [¶] 4. The perpetrator's conduct resulted in the unlawful killing." (Italics added.)

The jury was instructed in accordance with CALJIC No. 8.11 that malice is express "when there is manifested an intention unlawfully to kill a human being." It was further instructed pursuant to CALJIC No. 8.11 that malice is implied "when . . . [¶] [t]he killing resulted from an intentional act, [¶] [t]he natural consequences of the act are dangerous to human life, and [¶] [t]he act was deliberately performed with knowledge of the danger to, *and with conscious disregard for, human life*." (Italics added.) The trial court instructed the jury pursuant to CALJIC No. 8.30 that second degree murder is committed when the killing is perpetrated with malice aforethought and intent to kill but without deliberation and premeditation; it also instructed the jury pursuant to CALJIC No. 8.31 that second degree murder is committed "when . . . [¶] [t]he killing resulted from an intentional act, [¶] [t]he natural consequences of the act are dangerous to human life, and [¶] [t]he act was deliberately performed with knowledge of the danger to, *and with conscious disregard for, human life*." (Italics added.)

Appellant further attempts to distinguish *Lee* on the ground that the defendant there requested instruction on voluntary manslaughter, while she objected to such instruction. However, the Supreme Court pointed out that a defendant may not obtain a reversal predicated on an error that is favorable to him whether or not he requested the instruction. (*Lee*, *supra*, 20 Cal.4th at pp. 56-57.) She also argues that in *Lee*, the court observed that, pursuant to the instructions given, the jury likely considered the defendant's intoxication, rather than heat of passion, as negating malice. That analysis is not relevant to this case. The harmless error holding in *Lee* governs this case as well. Since the erroneous delivery of instructions on voluntary manslaughter inured to appellant's benefit, reversal is not required.

II. Appellant's conviction need not be reduced to involuntary manslaughter even if there was no evidence of sudden quarrel or heat of passion.

In a related contention, appellant claims that since there was no evidence of sudden quarrel or heat of passion, the evidence was insufficient to support her conviction of voluntary manslaughter and due process requires that her conviction must be reduced to involuntary manslaughter. This contention, too, must fail.

In *Lee*, the Supreme Court held that since the evidence was sufficient to establish intent to kill, and the arguably unsupported conviction of voluntary manslaughter therefore was favorable to the defendant, he could not obtain reversal as a result of the error. (*Lee*, *supra*, 20 Cal.4th at pp. 64-65.) Similarly, even if the evidence here was insufficient to establish sudden quarrel or heat of passion, which operated to reduce appellant's offense from murder to voluntary manslaughter, when the jury found her guilty of voluntary manslaughter it necessarily found that the killing either was intentional or was committed with conscious disregard for human life. This finding is supported by substantial evidence. (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 11.) The jury was given the option of finding her guilty of involuntary manslaughter on the theory of misdemeanor manslaughter based upon battery, but did not do so. Thus, even if the determination that appellant committed voluntary manslaughter because of sudden quarrel or heat of passion was not supported by substantial evidence, the error inured to

her benefit, since the jury otherwise found that the evidence established the elements of second degree murder, and appellant is not entitled to reduction of her conviction.

III. The omission of CALJIC No. 8.51 does not require reversal.

As indicated, the jury was instructed on the elements of murder and the lesser included offenses of voluntary and involuntary manslaughter. The theory of voluntary manslaughter was sudden quarrel or heat of passion, on which the jury was instructed pursuant to CALJIC No. 8.40, *ante*, and CALJIC Nos. 8.42, 8.43, and 8.44. The theory of involuntary manslaughter was that the killing of Sanchez was unintentional and occurred in the course of the commission of battery, a misdemeanor which is dangerous to human life.[4]

The trial court instructed the jury in accordance with CALJIC No. 8.50, explaining the distinction between murder and voluntary manslaughter.[5] The trial court did not give

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[4] The trial court instructed the jury in accordance with CALJIC No. 8.45 that "Every person who unlawfully kills a human being, without malice aforethought, and without an intent to kill, and without conscious disregard for human life, is guilty of the crime of involuntary manslaughter . . . . [¶] . . . [¶] A killing is unlawful within the meaning of this instruction if it occurred: [¶] 1. During the commission of an unlawful act not amounting to a felony which is dangerous to human life under the circumstances of its commission." The jury was further instructed that "An 'unlawful act' not amounting to a felony consists of a violation of Penal Code section 242, battery."

[5] CALJIC No. 8.50 was given as follows: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done in the heat of passion or upon a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel."

CALJIC No. 8.51, which explains the distinction between murder and involuntary manslaughter.[6]

Appellant contends that the trial court's failure to instruct pursuant to CALJIC No. 8.51 was reversible error. She argues that the trial court thus failed to instruct on a general principle of law applicable to the case, and that the error was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 because in the absence of the instruction, the jury was likely to have been confused between the types of conduct which could underlie a murder conviction and those which could lead to a conviction of involuntary manslaughter. She further argues that since there was no evidentiary support for a verdict of voluntary manslaughter, the jury was confused as to the distinction between voluntary and involuntary manslaughter, and, had it been properly instructed, it would have returned a verdict of involuntary manslaughter. This claim is unavailing.

Although CALJIC No. 8.51 was not given, its omission had no bearing on the outcome of this case. The trial court instructed the jury on the elements of first and second degree murder, and on the elements of voluntary manslaughter and involuntary manslaughter. The jury was instructed that involuntary manslaughter is a killing that is without malice aforethought, without an intent to kill, and without conscious disregard for human life. The jury found appellant guilty of voluntary manslaughter, necessarily determining, as set forth above, that the killing either was intentional or was committed with conscious disregard for human life. Given that determination, had it not decided

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6 CALJIC No. 8.51 provides, "[If a person causes another's death, while committing a felony which is dangerous to human life, the crime is murder. If a person causes another's death, while committing a [misdemeanor] [or] [infraction] which is dangerous to human life under the circumstances of its commission, the crime is involuntary manslaughter.] [¶] [There are many acts which are lawful but nevertheless endanger human life. If a person causes another's death by doing an act or engaging in conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder.]"

that the killing was the result of sudden quarrel or heat of passion, it necessarily would have returned a verdict of second degree murder. (*Lee*, *supra*, 20 Cal.4th at p. 52.)

In *Lee*, addressing the omission of a misdemeanor manslaughter instruction from the battery of instructions given on involuntary manslaughter, the Supreme Court found that the omission of the misdemeanor manslaughter instruction was harmless because the jury otherwise had been told it could find the defendant guilty of involuntary manslaughter if it found an unlawful, unintentional killing without malice, yet it found an intent to kill when it reached a verdict of voluntary manslaughter. (*Lee*, *supra*, 20 Cal.4th at pp. 62-63.) For similar reasons, here, it is not reasonably probable that the jury would have returned a verdict of guilty of involuntary manslaughter had CALJIC No. 8.51 been given.

IV. The trial court did not err in failing to deliver CALJIC No. 2.71.7.

Appellant contends that the trial court committed prejudicial error in failing to instruct the jury to view her oral admissions with caution, pursuant to CALJIC No. 2.71.7.[7] This claim lacks merit.

The trial court instructed the jury in accordance with CALJIC No. 2.70 as follows: "A confession is a statement made by a defendant in which she has acknowledged her guilt of the crime for which she is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime as well as the required criminal intent. [¶] An admission is a statement made by the defendant which does not by itself acknowledge her guilt of the crime for which the defendant is on trial, but which statement tends to prove her guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part. [¶] Evidence of an oral

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[7] That instruction provides, "Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed. [¶] It is for you to decide whether the statement was made by [a] [the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution."

confession or an oral admission of the defendant not made in court should be viewed with caution."

The Supreme Court in *People v. Lang* (1989) 49 Cal.3d 991, 1021, rejected a contention of error in the omission of CALJIC No. 2.71.1, holding that the delivery of CALJIC No. 2.71 adequately informed the jury that it should view the defendant's oral admissions with caution. CALJIC No. 2.71 as given in *People v. Lang*, *supra*, at page 1021, footnote 13, is substantially similar to CALJIC No. 2.70, which was given in this trial. CALJIC No. 2.70 encompassed the statements appellant made both before and after the commission of the charged offense, whereas CALJIC No. 2.71.7 only addresses statements made by the defendant before the offense.[8] There was no prejudice resulting from the failure of the trial court to give CALJIC No. 2.71.7.

V. The trial court properly admitted the autopsy photographs.

The trial court permitted the prosecutor to introduce four autopsy photographs of Sanchez over appellant's Evidence Code section 352 objection. Defense counsel argued that they had minimal probative value, since appellant was willing to stipulate to the findings of the coroner, and that they were inflammatory and cumulative. The prosecutor argued that the photographs showing the location and trajectory of the wounds were relevant as to the shooter's intent, and therefore as to appellant's intent. She pointed out that none of the photographs showed the victim's face, she had included only one photograph for each "scenario" to be described by the coroner, and that the photographs showing the wounds before the trajectory rods had been inserted were included because the rods tended to distend the wounds.

The trial court ruled that the photographs were more probative than prejudicial, stating that "they do have purposes, each of them to show potentially intent to kill and are

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8 After the shooting, appellant stated that she "wanted to take care of the people, who[] did what they were supposed to do, if they did it" and that she wanted confirmation because she did not want to pay "if it didn't happen." When she told Patino that she had paid people $500 to kill Sanchez, she stated, "Do you see me hurting?" and that Sanchez had "messed with the wrong person."

relevant to the issue here of whether or not the defendant hired someone to kill or hired someone to beat him up, because I suppose if she hired someone just to beat him up or to scare him, the bullets might not have been as quite well[] placed, which are demonstrated herein that they went exactly to places where the person would die, meaning areas near the neck and other fragile areas that can cause death."

Appellant contends that the trial court abused its discretion in admitting these photographs into evidence, denying her an impartial jury and due process, because there was no dispute as to the nature of the victim's wounds or the cause of his death. She complains that the photographs contained "gruesome depictions of Sanchez's wounds, including two pictures showing rods inserted through the wounds," and she argues that the erroneous admission of the photographs requires reversal. Appellant's contention is without merit.

Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he decision to admit victim photographs is a discretionary matter we will not disturb on appeal unless the prejudicial effect of the photographs clearly outweighs their probative value. [Citations.]" (*People v. Taylor* (2001) 26 Cal.4th 1155, 1168.)

Appellant does not claim that the photographs were not relevant, and their probative value is apparent. The nature and location of the wounds supported the prosecution theory of appellant's guilt of murder as an aider and abettor.[9] The photographs clarified the testimony of the deputy medical examiner, who explained his placement of the trajectory rods to show that a single bullet caused multiple wounds. The

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9 The prosecutor argued that Avance did what appellant hired him to do, while defense counsel argued that appellant hired Avance to beat Sanchez and Avance enlisted Johnson, who decided to shoot Sanchez when the victim did not drive along the expected route.

photographs were not cumulative even though they illustrated the testimony of the deputy medical examiner. (*People v. Box* (2000) 23 Cal.4th 1153, 1199.) The fact that other evidence could have established the point to be made by reference to the photographs, or that appellant did not challenge the testimony of the witness as to what was depicted in them, does not detract from their probative value. (*People v. Scheid* (1997) 16 Cal.4th 1, 17, 19.)

We agree with the trial court that the photographs were not more prejudicial than probative. Our examination of the photographs convinces us that, in and of themselves, they were not "inordinately gruesome." (*People v. Gurule* (2002) 28 Cal.4th 557, 625.) The prosecutor sought the introduction of only four photographs of the body after it was cleaned. The photographs were explained in a clinical fashion during the testimony of the medical examiner. Moreover, as in *People v. Scheid*, *supra*, 16 Cal.4th at page 20, the risk of prejudice to appellant was minimal since it was not argued that she was the shooter and the jury knew that she was not even present at the time of the shooting. In sum, the trial court's ruling admitting the four photographs was within the sound exercise of discretion. Apart from the waiver of the constitutional issues resulting from the absence of any objection on these grounds (*People v. Bolin* (1998) 18 Cal.4th 297, 319), there was no violation of any constitutional rights.

VI. Rochelle's testimony about Avance's criminal history was properly admitted.

Appellant objected on Evidence Code section 352 grounds to the introduction of testimony by Rochelle that Avance had been in prison for murder.[10] At an Evidence Code section 402 hearing, Rochelle testified that when appellant asked her if she knew someone "who could get Flavio Sanchez beat up," she informed appellant that Avance "probably would know somebody that could do it" because she thought that "he was an ex-gang member" and that "he had been in jail for murder." The prosecutor argued that "the fact that it's imparted to [appellant] is important" and that "it doesn't dirty her up,

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10 Defense counsel indicated that he believed Avance had a prior conviction of manslaughter.

because he's not alleged to be a friend of hers, and, therefore it doesn't make her look bad by association. [¶] . . . In fact, I don't see the prejudice other than it's incriminating." The trial court ruled that the evidence went to appellant's state of mind and was relevant "as to why [Avance] was hired and what [appellant] was looking for someone to do," and stated, "I am going to allow it."

Appellant contends that the trial court abused its discretion in admitting this testimony. She argues that there was no evidence the statement was true and that it was of limited probative value as to *her* state of mind, since it was volunteered by Rochelle in response to her inquiry about someone who would beat up Sanchez, not about someone who would kill him. She further asserts that in contrast to its slight probative value as to her own intent, as opposed to that of Rochelle, it was highly prejudicial, and that its introduction requires reversal. Appellant's contention lacks merit.

"Evidence is substantially more prejudicial than probative . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) The trial court has broad discretion in ruling on an Evidence Code section 352 issue, and its determination will be upheld absent an abuse of that discretion. (*Ibid.*)

The primary issue for the jury was whether appellant intended to have Sanchez beaten or killed. Whether or not Rochelle's statement to appellant that Avance had been in jail for murder was true, the statement was relevant to appellant's intent, since, as the trial court recognized, it tended to establish that after hearing it, appellant hired a person who would kill Sanchez. It also tended to establish the offense of murder on the theory of implied malice, which, as the jury was instructed, requires an intent to do an act the natural consequences of which are dangerous to human life, with knowledge of the danger and with conscious disregard for human life.

The substantial probative value of this evidence was not outweighed by the danger of undue prejudice. Prejudice under Evidence Code section 352 is "evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Bolin*, *supra*, 18 Cal.4th at p. 320.)

"'[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) As the prosecutor argued, evidence that Avance had been in jail for murder would not tend to evoke an emotional bias against appellant as an individual. Its potential for prejudice did not outweigh its substantial probative value on the issue of her intent in conjunction with evidence that, having been so advised, she hired him. The trial court did not abuse its discretion in admitting Rochelle's testimony.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P.J.
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_____, J.
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